in the first place, but fell off because, unbeknown to the driver and his attendant, it had been interfered with by some mischievous person or it fell off by act of God. In these circumstances, how can it be said that a *prima facie* offence under section 304A of the Penal Code or under section 34A of the Road Traffic Ordinance had been disclosed? In my judgment, in these circumstances the inspector and the O.C.P.D. were not justified in arresting the driver and the attendant without a warrant.

Mr. Ajaib Singh, for the defendants at this appeal, urged the court to look at the evidence as a whole and to take into account the fact that there are many timber lorries on the road in Pahang and the inconvenience that would be caused to the police if they were not allowed to arrest without a warrant in these circumstances. He cited with approval a passage in the learned judge's judgment where he said that it is in the public interest that the culprit responsible for Govindan's death should be caught and punished. That may be so, but it is equally in the public interest that no innocent person should be arrested without a warrant merely to serve the convenience of investigation officers, however much one wishes to support the police in their task of securing the safety of road users.

With the information available to the police officers at the time of the plaintiffs' arrest, at most the plaintiffs' could only be treated as potential witnesses. The law does not, however, empower the police to arrest and detain potential witnesses. The police should have proceeded against them under sections 111 and 112 of the Criminal Procedure Code. Section 111 empowers the police to require their attendance at the police station so that they may be questioned. If they attend, they may under section 112 be questioned. If they do not attend, then under sub-section (ii) of section 111 they may be compelled by a magistrate to attend. It is of course desired that the public should co-operate with the police in the enforcement of law. So it is important for the police to know and observe the limits of their power to arrest without warrant.

After the announcement by the court of its decision to allow the appeal, counsel retired briefly to consider quantum of damages. They returned to announce that they had agreed that each of the plaintiffs should be paid $2,500 by the defendants as well as receive costs here and in the court below. Judgment was entered accordingly.

*Appeal allowed.*

Solicitors: *Xavier & Thambiah.*

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## SING HOE MOTOR CO. LTD. v. PUBLIC PROSECUTOR

[O.Cr.J. (Raja Azlan Shah J.) May 22, 1968]

[K.L. — Criminal Application No. 1 of 1968]

*Road Traffic — Motor car used as public service vehicle — Unlicensed — Vehicle subject to hire-purchase agreement — Hirer convicted — Discretion to order forfeiture — Road Traffic Ordinance, 1958, s. 92(1) & (4).*

*Interpretation — "Shall" and "may".*

This was an application for an order that a motor-car which was seized under section 92(4) of the Road Traffic Ordinance, 1958, be released to the applicants as the true owners of the vehicle. One Yap had hired the vehicle from the applicants under a hire-purchase agreement. While the vehicle was still on hire-purchase, Yap was convicted under section 92(1) of the Road Traffic Ordinance for having used it as a public service vehicle. An order for the forfeiture of the vehicle was made under section 92(4) of the Ordinance. At the hearing of the application, the question before the court was whether, following a conviction for an offence under section 92(1), section 92(4) made it mandatory for the court to order a forfeiture of the vehicle.

**Held:** (1) it was not mandatory for the court to order a forfeiture of the vehicle where there has been a conviction under section 92(1) of the Road Traffic Ordinance. The word 'may' in section 92(4) of the Ordinance vested a discretion in the court whether or not to order a forfeiture. In order to exercise such discretion properly the known circumstances with regard to the particular vehicle should be fully considered;

(2) the order for forfeiture of the vehicle was wrongly made. The court ordered a proper enquiry as to the true ownership of the motor-vehicle.

*Cases referred to:—*

(1) *Public Prosecutor* v. *Ong Keng Seong* [1967] 1 M.L.J. 40.

(2) *Public Prosecutor* v. *Teoh Gaik Beng* [1967] 2 M.L.J. 110.

(3) *Gan Chye Huat* v. *Public Prosecutor* [1962] M.L.J. 27.

(4) *R.* v. *Ng Hee Weng & Ors.* [1956] M.L.J. 85.

(5) *Public Prosecutor* v. *Yap Yoke Sam* [1955] M.L.J. 114.

(6) *Gan Kim Luu* v. *Public Prosecutor* [1961] M.L.J. 35 at p. 36.

CRIMINAL APPLICATION.

*C. Thambiah* for the applicants.

*K. Somasundram* (Deputy Public Prosecutor) for the respondent.

*Cur. Adv. Vult.*

**Raja Azlan Shah J.:** This is an application for an order that motor-car bearing registration No. C 6721, the subject matter of Kuala Selangor Magistrate's Court Summons Case No. 378 of 1967 and forfeited by the learned magistrate under section 92(4) of the Road Traffic Ordinance 1958, be released to the applicants as the true owners of the said vehicle.

One Yap Kim Eng had bought the said motor-car on hire-purchase from the applicants. Whilst the said car was still on hire-purchase he was charged for having used it as a public service

vehicle under section 92(1) of the said Ordinance. The said car had been properly seized by the police. The case eventually came up for hearing before the learned magistrate, who convicted him. He further made an order for forfeiture of the said car under section 92(4) of the said Ordinance, feeling himself bound by the decision in *Public Prosecutor* v. *Ong Keng Seong.*[1] The applicants were not given an opportunity to be heard.

The provisions of section 92(4) of the said Ordinance have been the subject of conflicting judicial decision and in the circumstances it is not surprising that magistrates find it difficult to state with that certainty the law applicable to forfeiture. It is sufficient if I review two earlier decisions.

In *Public Prosecutor* v. *Teoh Gaik Beng,*[2] Ong Hock Sim J., after a careful examination of all the earlier cases except that of *Gan Chye Huat* v. *Public Prosecutor,*[3] came to the view that "no such discretion exists following a conviction". The learned judge seems to draw an analogy from the interpretation put forward by Good J. in *R.* v. *Ng Hee Weng & Ors.,*[4] a case under the Customs Ordinance 1952. With respect, I am of the view that it affords no assistance and indeed it is highly dangerous and misleading to draw an analogy from an interpretation of of another statute passed at different times and in pursuance of different lines of thought. A comparative analysis of the provisions of section 92(4) of Road Traffic Ordinance and that of section 123 of Customs Ordinance will elicit the differences. Whilst section 92(4) of Road Traffic Ordinance enacts that

> ". . . . an Order for the forfeiture of such vehicle *may* be made if it is proved to the satisfaction of the court that an offence against this section has been committed . . . ."

section 123(1) of Customs Ordinance enacts that

> ". . . . an Order for forfeiture of the goods *shall* be made if it is found to the satisfaction of the court that an offence against the Ordinance has been committed . . . .".

A distinction between the words "may" and "shall" in both the sections as is rightly pointed out in [1967] 2 M.L.J. xxiii must be borne in mind in interpreting the two sections. If it is the intention of the legislature to construe "may" as "shall" it would have expressed so in unequivocal and comprehensive terms.

The learned judge further took the view that the word "may" in section 92(4) would cover the type of case envisaged by the proviso to section 92(1) even though an offence against the section has been proved to the satisfaction of the trial court. If my understanding of his reasoning, is correct, that construction would seem to apply to cases where an offence against section 92(1) has been committed but applying the proviso the offender is not convicted. In simple words, an offence under this section is committed, but with regard to sentence he was for example discharged under section 173(ii)(a) of the Criminal Procedure Code. See for example *Public Prosecutor* v. *Yap Yoke Sam.*[5]

With that construction I respectfully agree. In such circumstances forfeiture is not mandatory. That, in my opinion, is one possible construction. If it is said that that is the only construction, then I say that it is a narrow approach to the whole problem. In my view, the section must be read as a whole. It is also pertinent to bear in mind the penal nature of the statute, and that being so, the natural construction should clearly prevail for the benefit of the person against whom a breach is alleged.

The learned judge cited a certain passage from the judgment of Ong Hock Thye J. (now F.J.) in *Gun Kim Luu* v. *Public Prosecutor* [6] with approval. That passage which must be considered as a *dictum* was subsequently corrected by that learned judge in *Gan Chye Huat* v. *Public Prosecutor,*[3] where he observed that the order that must be made under section 92(4) of the Ordinance is "for the forfeiture or for the release of any motor-vehicles seized".

I would dissent from the view that no such discretion exists following a conviction. When a discretion as that envisaged in section 92(4) of the Ordinance is given to the courts it means that it is not impossible to conceive of cases which could not be foreseen by the legislature in which an order for forfeiture is unsuitable. Such circumstances will normally be found in the facts of each particular case, and in order to exercise such discretion properly the known circumstances with regard to the particular motor-vehicle should be fully considered. That implies an enquiry as to the true character of the motor-vehicle concerned, whether it is the subject of a hire-purchase agreement or otherwise. That this seems to be desirable is implicit in a statute which entails penal consequences, that no violence must be done to its language to bring people within it, but rather care must be taken that no one must be brought within it who is not within its express language. Therefore, to adopt that narrow approach as applied by Ali J. in *Public Prosecutor* v. *Ong Keng Seong* [1] in not enquiring beyond the bare fact of registration is unrealistic to be acceptable and tends to work injustice on an innocent party.

For the above reasons which I have just given there is ground for saying that the learned magistrate had exercised his discretion otherwise than rightly. I feel the order for forfeiture was wrongly made and I would therefore order a proper enquiry as to the true ownership of the motor-vehicle under consideration.

*Order accordingly.*

Solicitors: *Xavier & Thambiah.*